



Application No.: 10/789,444

Attorney Docket No.: 48550/P003US/10309896

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TRANSMITTAL OF APPEAL BRIEF

Docket No.
48550/P003US/10309896

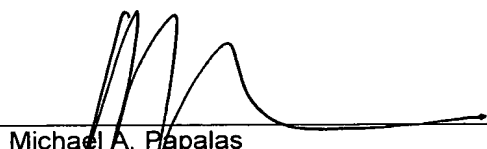
In re Application of: David Shaver et al.

Application No.
10/789,444-Conf. #5009Filing Date
February 27, 2004Examiner
S. T. NguyenGroup Art Unit
3643

Invention: GROWING VINED PLANTS

TO THE COMMISSIONER OF PATENTS:Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal
filed: April 3, 2006The fee for filing this Appeal Brief is \$ 500.00☒ Large Entity☐ Small Entity☐ A petition for extension of time is also enclosed.

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Docket No.: 48550/P003US/10309896
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
David Shaver et al.

Application No.: 10/789,444

Confirmation No.: 5009

Filed: February 27, 2004

Art Unit: 3643

For: GROWING VINED PLANTS

Examiner: S. T. Nguyen

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

As required under § 41.37(a), this brief is filed within two months of the Notice of Appeal filed in this case on April 3, 2006, and is in furtherance of said Notice of Appeal.

The fees required under § 41.20(b)(2) are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37 and M.P.E.P. § 1206:

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|------------|---|
| I. | Real Party In Interest |
| II | Related Appeals and Interferences |
| III. | Status of Claims |
| IV. | Status of Amendments |
| V. | Summary of Claimed Subject Matter |
| VI. | Grounds of Rejection to be Reviewed on Appeal |
| VII. | Argument |
| VIII. | Claims |
| IX. | Evidence |
| X. | Related Proceedings |
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I. REAL PARTY IN INTEREST

The real party in interest for this appeal is:

Desert Glory, Ltd.

II. RELATED APPEALS, INTERFERENCES, AND JUDICIAL PROCEEDINGS

There are no other appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS

A. Total Number of Claims in Application

There are 10 claims pending in application.

B. Current Status of Claims

1. Claims canceled: none
2. Claims withdrawn from consideration but not canceled: none
3. Claims pending: 1-10
4. Claims allowed: none
5. Claims rejected: 1-10

C. Claims On Appeal

The claims on appeal are claims 1-10.

IV. STATUS OF AMENDMENTS

Appellant filed an Amendment After Final Rejection on March 3, 2006. The Examiner responded to the Amendment After Final Rejection in an Advisory Action mailed March 24, 2006. In the Advisory Action, the Examiner indicated that Appellant's request for reconsideration was considered but did not place the application in condition for allowance.

V. SUMMARY OF CLAIMED SUBJECT MATTER

According to independent claim 1, a method for growing a plant (page 2, lines 1-2) comprises the steps of planting the plant in a growth medium (page 2, lines 1-2 and page 3, lines 2-4), twisting at least two plant vines of the plant together to form a growing unit (page 2, lines 1-3 and FIG. 2), and maintaining the growing unit during the growth and production cycles of the plant (page 2, lines 1-4).

According to independent claim 4, a yield maximization system (page 4, lines 5-6, page 4, line 29-page 5, line 2) comprises a growth medium for sustaining the growth of a plant (page 3, lines 2-4), said plant having vines growing from a single root system (page 4, line 25), and supports for twisting at least pairs of the vines around individual ones of the supports (page 4, lines 7-20).

According to independent claim 6, a method for growing a plant (page 2, lines 1-2) comprises twisting at least two plant vines of the plant around a flexible material (page 4, lines 14-17) and securing the flexible material (page 4, lines 7-11), wherein the at least two plant vines are twisted vertically around the flexible material (FIG. 2 and page 4, line 23).

According to independent claim 9, a method for growing a plant (page 2, lines 1-2) comprises planting a plant in a growth medium (page 2, lines 1-2 and page 3, lines 2-4), wherein plant vines are produced from the plant (page 4, lines 25-26) and attaching at least a pair of the plant vines to one another with a flexible material (page 4, lines 7-20) wherein the at least a pair of plant vines are twisted together around the flexible material (page 4, lines 7-20).

VI. GROUNDS OF OBJECTION TO BE REVIEWED ON APPEAL

Claims 1, 3, 4, 6-9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by The Hop Picking Year article (hereinafter *Hop*).

Claims 2, 5 and 10 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over *Hop* in view of French Application FR2797559A1 to Gaudru (hereinafter *Gaudru*).

The Examiner also stated that the *Tillinghast* reference clearly anticipates Appellant's invention.

VII. ARGUMENT

A. 35 U.S.C. § 102(b) Rejection of Claims 1, 3, 4, 6-9

Claims 1, 3, 4, 6-9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by *Hop*. The Examiner has claimed that *Hop* qualifies as prior art; however, the Examiner has not addressed all of Appellant's arguments, and thus has not made a prima facie showing that *Hop* qualifies as a "printed publication."

A reference is shown to be a "printed publication" "upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested or and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it." *See In re Wyer*, 655 F.2d 221 (CCPA 1981) (quoting *I.C.E. Corp. v. Armco Steel Corp.*, 250 F. Supp. 738, 743 (S.D.N.Y. 1966)). The Examiner states that *Hop* is a 102(b) publication "because the article discussed about the Guinness Time, which is a newspaper dating back to 1958." *See* Office Action dated January 3, 2006, at 5. Although *Hop* appears to have been first created in 1958, the copy of *Hop* provided by the Examiner does not appear to have been first placed on the Internet until after Appellant's filing date. *See* Internet Archive Wayback Machine search, http://www.bygonebodiam.co.uk/Hop_Training.htm. Prior art disclosures on the Internet are considered to be publicly available as of the date the item was publicly posted. Thus, *Hop*, in the form provided by the Examiner, may not be considered as prior art to Appellant's invention as the date of publication falls after Appellant's filing date.

In the Advisory Action of March 24, 2006, the Examiner admitted that *Hop* does not beat the date of the application but claims that *Hop* discusses a printed publication, the Guinness Time, which allegedly dates back to 1958. *See* Advisory Action, continuation sheet. Appellant maintains that these are mere allegations and lack any showing of substantive evidence. In other words, the Examiner has not provided Appellant with any corroboration of such statements, particularly given that the Examiner has provided no support for the existence of the Guinness Time other than its one mention on this website.

In addition, an Internet search for “Guinness Time” does not reveal the existence of such a publication, and accordingly does not indicate that “persons interested or and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it [the Guinness Time].” While the Examiner relies upon the website creator’s statements as to how he became fascinated by hop growing after visiting the Guinness plant in Ireland, the Examiner has failed to demonstrate that the “Guinness Time” exists other than in allegedly being accessible to a visitor to the Guinness plant in Ireland. Thus, Appellant believes that the Examiner has not made a satisfactory showing that the document qualifies as a printed publication.

Further, the Examiner has not shown that a presumption may be raised that the portion of the public concerned with the art would know of the invention in *Hop*. See *In re Bayer*, 568 F.2d 1357 (CCPA 1978). With respect to an article, such as *Hop*, if it is an article disseminated by mail, then it is not prior art until it is received by at least one member of the public, and thus, the date when the first person received the article is the effective date of publication, not the date it was mailed or sent to the publisher. See *In re Schlittler*, 234 F.2d 882 (CCPA 1956); see also *Carella v. Starlight Archery*, 804 F.2d 135, 231 U.S.P.Q. 644 (Fed. Cir. 1986). Although the date on *Hop* may suggest that it was created in 1958 and the Examiner has claimed that the Guinness Time was a “publicly posted publication,” the Examiner has not made a satisfactory showing that *Hop* was received by the public nor has the Examiner shown that the portion of the public concerned with the art would know of the invention in *Hop*.

The Examiner claims in the Advisory Action that the Guinness Time was made public because “how else would the author of *Hop* article obtained it, especially when the author is merely an average ‘joe’ who is fascinated in hop growing after he visited the Guinness plant in Ireland.” However, this is not the test for determining whether *Hop* is a proper § 102(b) printed publication. The Examiner has failed to demonstrate what type of “publication” the Guinness Time is, and given that the Guinness Time apparently is not accessible in any other method than through this one website identified by the Examiner, the presumption cannot be raised that the public concerned with the art would know of the invention in *Hop*. Therefore, the Examiner has not demonstrated that *Hop* is a proper § 102(b) printed publication, and accordingly, claims 1, 3, 4, and 6-9 should be rendered patentable.

B. 35 U.S.C. § 103(a) Rejection of Claims 2, 5 and 10

Claims 2, 5 and 10 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Hop* in view of *Gaudru*. Appellant hereby traverses these rejections. As discussed with respect to the Examiner's rejection of claims 1, 3, 4, and 6-9 under 35 U.S.C. § 102(b), the Examiner has not shown that *Hop* is a proper prior art reference. As claim 2 depends directly from independent claim 1, claim 5 depends directly from independent claim 4, and claim 10 depends directly from independent claim 9, these claims also should be rendered patentable for at least the reasons stated with respect to claims 1, 3, 4, and 6-9.

C. *Tillinghast* Reference

In the Advisory Action of March 24, 2006, the Examiner identifies the *Tillinghast* reference and claims that it clearly anticipates the invention. While admittedly the Examiner mentioned *Tillinghast* reference in the Final Office Action dated January 3, 2006, it was merely listed in the Notice of References Cited, and no substantive rejection was made. "Where a claim is refused for any reason relating to the merits thereof it should be 'rejected' and the ground of rejection fully and clearly stated, and the word "reject" must be used. The Examiner has neither identified what claims of the invention that the *Tillinghast* reference allegedly anticipates nor has the Examiner provided reasons for maintaining that an anticipation rejection is proper. Accordingly, the Examiner's statements are not proper.

Thus, the Examiner has failed to state proper grounds of rejection based on the *Tillinghast* reference.

VIII. CLAIMS

A copy of the claims involved in the present appeal is attached hereto as Appendix A.

IX. EVIDENCE

No evidence pursuant to §§ 1.130, 1.131, or 1.132 or entered by or relied upon by the examiner is being submitted.

X. RELATED PROCEEDINGS

No related proceedings are referenced in II. above, or copies of decisions in related proceedings are not provided, hence no Appendix is included.

Dated: June 5, 2006

Respectfully submitted,

By 

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APPENDIX A

Claims Involved in the Appeal of Application Serial No. 10/789,444

1. (Original) A method for growing a plant comprising the steps of:
planting said plant in a growth medium;
twisting at least two plant vines of said plant together to form a growing unit; and
maintaining said growing unit during the growth and production cycles of said plant.
2. (Previously Presented) The method of claim 1 wherein said maintaining step comprises the step of:
securing one end of a flexible material at the base of said plant.
3. (Original) The method of claim 1 wherein said twisting step comprises the step of:
twisting said at least two plant vines together around a flexible material.
4. (Original) A yield maximization system comprising:
a growth medium for sustaining the growth of a plant, said plant having vines growing from a single root system; and
supports for twisting at least pairs of said vines around individual ones of said supports.
5. (Original) The yield maximization system of claim 4 wherein said supports comprise:
a flexible material having one end tied around the base of said plant and the opposite end supported above said vines.
6. (Original) A method for growing a plant, said method comprising:
twisting at least two plant vines of said plant around a flexible material; and
securing said flexible material, wherein said at least two plant vines are twisted vertically around said flexible material.
7. (Original) The method of claim 6 wherein said flexible material comprises string.

8. (Original) The method of claim 6 wherein said flexible material comprises a rod.

9. (Previously Presented) A method for growing a plant comprising:
planting a plant in a growth medium, wherein plant vines are produced from said plant; and

attaching at least a pair of said plant vines to one another with a flexible material, wherein said at least a pair of said plant vines are twisted together around said flexible material.

10. (Original) The method of claim 9, wherein said attaching step comprises:
securing one end of said flexible material at the base of said plant; and
securing the opposite end of said flexible material at a height taller than said plant.